

¹ Docket No. 04-839 (issued March 16, 2005).

overpayment of benefits for the period March 10 to April 19, 2003.² However, the Board disagreed that appellant was at fault in creating the overpayment. Accordingly, the Board reversed the Office's finding of fault and remanded the case for consideration of whether appellant was entitled to waiver of recovery of the overpayment. The Board also set aside the Office's decision to recover the overpayment by deducting \$150.00 every 28 days from appellant's ongoing compensation payments.

On remand, the Office asked appellant to submit an overpayment recovery questionnaire detailing her current monthly expenses and income. Appellant had previously submitted an October 20, 2003 questionnaire that listed available cash and savings of \$66.04 and liabilities totaling \$19,523.05. At that time, she had three dependents and monthly expenditures of \$2,760.00.³ Appellant's reported monthly income was \$2,769.58. In a July 6, 2005 overpayment recovery questionnaire, she identified her daughters, ages 12 and 22, as dependents. Appellant reported a monthly income of \$2,530.98 and monthly expenses of \$2,530.00. Her itemized monthly expenses included \$800.00 for rent, \$580.00 for food, \$100.00 for clothing, \$500.00 for utilities and other expenses of \$550.00. She listed her total assets at \$53.00.

The Office sought clarification regarding appellant's "other expenses" totaling \$550.00 and her claimed utilities of \$500.00 per month. Appellant later submitted monthly billing statements for cable service (\$102.61), gas and electric (\$85.54), cellular telephone service (\$239.87) and automobile insurance (\$171.66).⁴ In a September 7, 2005 letter, she provided the following additional itemized expenses: fuel -- \$200.00; miscellaneous household expenses -- \$150.00 (household cleaning materials); automobile expenses -- \$70.00 (minor maintenance); and personal necessities -- \$150.00 (toiletries). Appellant's adjusted monthly income totaled \$2,741.89 and her claimed monthly expenses were \$2,649.68, which represented a monthly cash surplus of \$92.21.⁵

In a decision dated September 23, 2005, the Office denied waiver of recovery of the overpayment. Appellant's monthly expenses for cable and cellular telephone services were found to be excessive.⁶ The Office allowed only \$50.00 for each. By disallowing certain expenses, appellant's monthly income exceeded her expenses by more than \$300.00.

² The overpayment arose when appellant returned to work part time on March 10, 2003 and the Office continued to pay her for eight hours of wage-loss compensation per day through April 19, 2003.

³ Appellant's itemized monthly expenditures included \$1,100.00 for rent, \$400.00 for food, \$250.00 for utilities and \$80.00 for other miscellaneous expenses. She also paid \$930.00 a month toward her accumulated debt of \$19,523.05.

⁴ Appellant submitted billing statements covering at least two months and in some instances three months. The above-noted figures represent the average monthly cost based on the billing statements provided.

⁵ The Office adjusted appellant's 28-day compensation payment of \$2,530.98 to reflect what she would receive on a monthly basis ($\$2,530.98 \times 13 \text{ weeks} \div 12 \text{ months} = \$2,741.89$).

⁶ Appellant claimed that her monthly expense for the two services was \$367.00; however, the billing statements reflect an average monthly billing of only \$342.48.

Appellant requested reconsideration on April 3, 2006.⁷ She filed for bankruptcy protection on January 4, 2006 and provided the Office with a copy of the Bankruptcy Court notice of filing. The notice included a list of creditors to whom appellant owed a total of \$18,597.34. She also submitted invoices from October and November 2005 for her daughter's college tuition.⁸ Appellant had agreed to pay \$2,000.00 in tuition in monthly installments of \$250.00. According to the November 5, 2005 billing statement, appellant had an outstanding balance of \$1,250.00 and she had already paid \$750.00.

By decision dated June 29, 2006, the Office denied modification of the September 23, 2005 decision denying waiver of recovery.

LEGAL PRECEDENT

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.⁹ Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by the Office.¹⁰ Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹¹

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be

⁷ Appellant initially filed an appeal with the Board. However, she later withdrew her appeal in order to pursue reconsideration before the Office. The Board issued a March 21, 2006 order dismissing the appeal (Docket No. 06-506).

⁸ Appellant indicated that she had paid tuition for her daughter, Jacqueline Chavez, to attend Notre Dame de Namur University in Belmont, CA.

⁹ 5 U.S.C. § 8129(b) (2000); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (2006).

¹⁰ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (October 2004).

¹¹ 20 C.F.R. § 10.437(a)(b).

against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹²

ANALYSIS

Appellant takes issue with the Office's decision to substantially reduce her documented cable and telephone expenses. She also challenges the Office's decision to disallow her \$250.00 monthly college tuition expense for her daughter. An individual is deemed to need substantially all her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³ If fully credited, appellant's disallowed monthly expenses would eliminate the income surplus found by the Office.

An individual's ordinary and necessary living expenses include fixed living expenses, such as food and clothing, furniture, household and personal hygiene supplies, rent, mortgage payments, utilities, maintenance, insurance (automobile, life and health), taxes, automobile expenses and commuting expenses.¹⁴ Additional allowable expenses include nonreimbursed medical and hospitalization expenses, church and charitable contributions made on a regular basis and miscellaneous expenses, such as newspapers and haircuts, not to exceed \$50.00 per month.¹⁵ An individual may also claim expenses for the support of others for whom the individual is responsible, such as dependent child daycare, child support or alimony.¹⁶

A finding that a type of expense is ordinary and necessary does not mean that the amount is ordinary and necessary.¹⁷ The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose.¹⁸ If the Office determines that the amount of a particular expense is not ordinary and necessary, the Office must state in writing the reason for the finding.¹⁹ Furthermore, the finding must be supported by rationale, which may include reference to recognized research data that would show that the claimant's expenses exceed the average or range of expenses for the general population relevant to the claimant's circumstances.²⁰

¹² *Id.* at § 10.438(a).

¹³ *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(3) (May 2004).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Appellant's monthly bill for Comcast cable service averaged \$102.61, but the Office allowed only \$50.00. The Office explained: "Basic cable varies in the Bay Area and is more expensive in San Francisco in comparison to outlying areas. [Appellant] lives in South San Francisco; therefore, a monthly cable bill of \$50.00 would be considered very reasonable." Although the Office's rationale is ostensibly reasonable, the record is devoid of evidence indicating the prevailing rates for Comcast cable service in the San Francisco metropolitan area. On reconsideration, appellant stated that her monthly Comcast bill included Internet service, which was necessary for her daughters' education.²¹ The June 29, 2006 decision denying modification indicated that ordinary and necessary expenses may include "miscellaneous expenses," such as "[I]nternet access," not to exceed \$50.00 per month.

The Board finds that the Office erroneously disallowed a portion of appellant's monthly payment to Comcast. First, the Office did not provide any support for its finding that a monthly cable bill of \$50.00 would be considered reasonable for the South San Francisco area where appellant resided. Other than the bills appellant submitted, the record is devoid of evidence regarding prevailing cable service rates in the San Francisco Bay area. The claims examiner's personal knowledge is not an adequate substitute. Second, the June 29, 2006 decision indicated that a miscellaneous expense of up to \$50.00 for Internet access was considered an ordinary and necessary expense. Given the Office's stated position, appellant's monthly expense associated with providing Internet access for her daughters' education may be allowed.

The Office also failed to substantiate its reason for disallowing approximately 80 percent of appellant's monthly cellular telephone expense. The record indicates that appellant's average monthly cellular telephone bill from T-Mobile was \$239.87. She explained that her cellular bill covered two cellular telephones that she and her daughters shared. Appellant further indicated that she did not have a land line at her residence and thus, the two cellular telephones were her family's primary means of communicating. The Office disallowed all but \$50.00 of appellant's documented monthly cellular service fees. The initial claims examiner explained as follows:

"Cell[ular] [tele]phones can be less expensive than standard [tele]phones, especially with the appropriate [tele]phone plan. Even so, a [tele]phone bill averaging over \$200.00 would be considered excessive by this Office. An allowable \$50.00 per month for a cell[ular] [tele]phone would be considered more of a basic cost and moreover, very possible with the appropriate [tele]phone plan."

Once again, the Office failed to explain its finding that a \$50.00 per month cellular telephone bill was more appropriate under the circumstances. The Office did not provide any documentation on comparative plans and costs. The rationale provided amounts to no more than an opinion on what is excessive. The Office must base its findings on available facts and not merely conjecture. The necessity of appropriately documented rationale is clearly set forth in the Office's procedure manual.²²

²¹ The Comcast billing information appellant submitted does not include an itemization of services provided.

²² See *supra* note 14.

The last item in dispute is appellant's monthly tuition payments on behalf of her eldest daughter, Jacqueline Chavez. The record indicates that appellant was responsible for paying \$2,000.00 of her daughter's college tuition. She entered an installment agreement whereby she would remit \$250.00 per month. As of November 5, 2005, appellant had paid \$750.00 and she had an outstanding balance of \$1,250.00. However, the information regarding her monthly tuition payments was not made available to the Office when it initially denied waiver of recovery on September 23, 2005.

In disallowing the expense on reconsideration, the Office stated that "[appellant] indicated that paying for her daughter's tuition was necessary, but [she] did not provide an entire record of such tuition at the time of the [September 23, 2005] decision and why such cost was a necessary expense." It appears that appellant is being penalized in part for not having provided the tuition payment information sooner. If this is the case, such an approach would be clearly inconsistent with the regulations defining the parameters for obtaining merit review.²³ Reconsideration is premised in part on presenting relevant and pertinent new evidence not previously considered by the Office.²⁴ There is no requirement that the "new" evidence must have previously been unavailable. Moreover, section 10.438, which describes the overpayment recipient's responsibility to submit financial information, does not preclude further consideration of waiver based on subsequently submitted evidence.²⁵

As to the nature of the expense, the procedure manual is not particularly instructive on the question of whether a parent's agreement to defray a portion of a dependent's college educational expenses is to be considered ordinary and necessary. Certain expenses such as dependent child daycare, child support or alimony are specifically identified, but college tuition is not mentioned.²⁶ Despite this silence, it is counterintuitive to allow for augmented compensation for a dependent college student under the Act, but then disallow tuition expenses for lack of evidence that such payments are necessary.²⁷ The Office's explanation for disallowing appellant's documented \$250.00 monthly tuition expense is neither rational nor clearly supported by law.

Fully restoring appellant's previously disallowed cellular telephone (\$239.87) and cable/Internet expenses (\$102.61) and allowing her monthly educational expense (\$250.00), appellant's current ordinary and necessary monthly expenses would total \$2,899.68. When compared to her adjusted monthly income of \$2,741.89, appellant would have a monthly deficit of \$157.79. On her July 6, 2005 overpayment questionnaire, appellant reported assets of \$53.00 and her January 4, 2006 notice of bankruptcy filing identified \$18,597.34 in unpaid debts.

²³ See 20 C.F.R. § 10.606(b)(2).

²⁴ *Id.*

²⁵ 20 C.F.R. § 10.438(b).

²⁶ See *supra* note 14.

²⁷ See 20 C.F.R. § 10.405(a).

Based on the evidence of record, appellant would meet both prongs of the test for determining whether recovery of the overpayment would defeat the purpose of the Act. She would require substantially all of her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and her assets do not exceed the applicable resource base of at least \$8,000.00.²⁸

CONCLUSION

The case is not in posture for decision. On remand the Office shall evaluate appellant's claimed expenses and provide proper reasoning for any reductions or disallowances.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: May 4, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²⁸ *Id.* at § 10.436(a), (b); *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (October 2004).